follows (the term "appellant" has reference to Phillips Petroleum Company):

1. The statutory provisions believed to sustain the jurisdiction are:

Sec. 237 (a) of the Judicial Code (Title 28 U. S. C. A., Sec. 344 (a), which provides:

> "A final judgment or decree in any suit in the highest court of a state in which a decision in the suit could be had * * * where is drawn in question the validity of a statute of any state, on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court upon a writ of error."

An Act approved January 31, 1928, Chap. 14, Sec. 1, 70th Congress, 45 U. S. Statutes at Large, page 54 (Title 28 U. S. C. A., Sec. 861 a), which provides:

> "The writ of error in cases, civil and criminal, is abolished. All relief which heretofore could be obtained by writ of error shall hereafter be obtainable by appeal."

2. The statute of the State of Arkansas, the validity of which is involved, is Section 7137, Crawford & Moses Digest of the Statutes of Arkansas, reading as follows:

> "Hereafter all railroad companies operating within this State, whether incorporated or not, and all corporations of every kind and character, and every company whether incorporated or not, engaged in the mining of coal, who may employ agents, servants or employees, such agents, servants or employees being in the exercise of due care, shall be liable to respond in damages for injuries or death sustained by any such agent, employee or servant, resulting from the careless omission of duty or negligence of such employer, or which may

result from the carelessness, omission of duty or negligence of any other agent, servant or employee of the said employer, in the same manner and to the same extent as if the carelessness, omission of duty or negligence causing the injury or death was that of the employer."

Only that portion of the above statute applicable to "all corporations of every kind and character" is involved, the appellant not being a railroad company or engaged in the mining of coal.

3. The judgment of the Supreme Court of Arkansas upholding the validity of the above mentioned portion of said statute was rendered on the 6th day of May, 1935, and appellant's petition for rehearing was overruled on the 10th day of June, 1935. The petition for appeal was presented on the 24th day of June, 1935.

4. The action was one at law for the recovery of damages for personal injuries alleged to have been sustained by appellee as the result of negligence of Joe H. Myers while both appellee and Myers were employed by and were engaged in the performance of their duties for appellant. Appellee and Myers were engaged in carrying a joint of pipe, appellee carrying the front end and Myers walking behind him carrying the rear end. Myers is alleged to have shifted the pipe from one shoulder to the other, causing a jerk which broke appellee's stride and caused him to step in a hole in the ground and fall. Both men were working under the direction of Jim Forsythe, foreman, and were fellow-servants (see Complaint and Bill of Exceptions, page 13). The court, over the objection and exception of appellant, gave to the jury "plaintiff's Instruction No. 1" (Bill of Exceptions, page 240), instructing the jury in substance

that if Myers was negligent as alleged and appellee was injured thereby, the appellant was liable.

The appellant requested the court to direct a verdict in its favor, which request was refused. (Bill of Exceptions, page 237).

In its motion for new trial, filed in the trial court, which serves as assignment of errors in the Supreme Court of Arkansas, appellant set up the following errors (Bill of Exceptions, page 253):

> "Eighth: The court erred in refusing to give in charge to the jury this defendant's requested written instruction numbered 1, to wit:
>
> " 'You are instructed to return a verdict for the defendant, Phillips Petroleum Company.'
>
> To which refusal of the court to give said instruction to the jury the defendant, Phillips Petroleum Company, at the time excepted and asked that its exceptions be noted of record.
>
> "The error of the court in refusing to give said instruction was in this, to wit: The only negligence alleged in the complaint was that of the individual defendant, Joe H. Myers, who was a fellow-servant of the plaintiff, and the evidence offered in the trial of the case tended to prove negligence only on the part of said defendant and the plaintiff. Under these facts, it clearly appeared that if the plaintiff was injured as alleged in his complaint, it was because of negligence on the part of himself and/or said individual defendant, and contributory negligence on his part and/or the negligence of his fellow-servant, Joe H. Myers, was a good and complete defense to the plaintiff's cause of action, and Sections 7137 and 7145 of Crawford & Moses Digest of the Statutes of Arkansas, which purport to deprive this defendant of said defenses, are unconstitutional and void, in that they violate and con-

travene Section 1 of Article 14 of the Constitution of the United States of America in the respects hereinafter alleged.

"Ninth: The court erred in giving in charge to the jury, over the objections of this defendant, plaintiff's requested instruction numbered 1, to wit: [quoting the instruction, which, for the sake of brevity is omitted herein]. To the ruling of the court in giving said instruction defendant excepted and asked its exceptions be noted of record.

"That said instruction is misleading and erroneous in this, to wit: That it makes this defendant respond in damages for an act of its servant resulting in injury to his fellow-servant and is based on Sec. 7137 of Crawford & Moses Digest of the Laws of Arkansas, and that same is invalid as violating the Fourteenth Amendment to the Constitution of the United States, Sec. 1, in that this defendant, a corporation, is a citizen and that it is denied equal protection of the laws in its property rights with other citizens of Arkansas who are individuals, in that said law (Sec. 7137 C. & M. Digest) attempts to make it respond in damages to its servant for the negligence of a fellow-servant, but does not impose upon individuals employing servants the duty to respond in damages to a servant for the negligent act of a fellow-servant, and that it is not alleged, nor was any proof offered to show, that this defendant, Phillips Petroleum Company, was operating any railroad, nor that it was engaged in the mining of coal, and in fact it was not engaged in operating any railroad or any coal mine."

The motion for new trial was considered by the trial court and overruled (Bill of Exceptions, page 258); and the constitutionality of said statute was considered by the Supreme Court and the validity thereof upheld in the following language:

"The Petroleum Company, in its motion for a new trial, filed approximately sixty-four days after the re-

turn of the verdict, raised the question of the constitutionality of Sec. 7137 of Crawford & Moses' Digest upon which the liability of the Petroleum Company is predicated. This section abrogates the fellow-servant law in so far as it applies to corporations and creates liability as to them for injury to employees caused by negligence of fellow servants. The contention that said act is unconstitutional is one of the grounds urged for a reversal of the judgment. It is the contention of the appellee that this question was waived by the failure of the defendant in the court below to interpose this defense by demurrer, answer, or other appropriate plea. We pass this contention for the reason that this Court, in numerous decisions for a period of more than twenty-five years, has upheld the constitutionality of Section 7137, *supra,* the latest expression being in the case of *Postal Tel. Cable Co.* v. *White,* Law. Rep., Vol. 56, p. 291, Ms. Op."

The fact that the Supreme Court of Arkansas passed upon the validity of the statute and upheld it gives the United States Supreme Court jurisdiction on appeal whether or not the question was properly and timely raised in the lower court.

Rothschild v. *Knight,* 184 U. S. 334, 46 L. Ed. 573;

San Jose Land & Water Co. v. *San Jose Ranch Co.,* 189 U. S. 177, 47 L. Ed. 765;

Manley v. *Park,* 187 U. S. 547, 47 L. Ed. 296;

Home Insurance Co. v. *Dick,* 281 U. S. 397, 74 L. Ed. 926;

Abie State Bank v. *Bryan,* 282 U. S. 765, 75 L. Ed. 690.

Plaintiff's complaint and evidence and the court's instructions were based upon the above statute. The exception to plaintiff's Instruction No. 1, the request for a

peremptory instruction, and the motion for new trial were sufficient to challenge the constitutionality of said statute.

People of New York v. *Zimmerman,* 278 U. S. 63, 73 L. Ed. 184, 62 A. L. R. 785;

International Harvester Co. of America v. *Missouri,* 234 U. S. 199, 58 L. Ed. 1276;

National Mutual Building & Loan Assn. of New York v. *Brahan,* 193 U. S. 635, 48 L. Ed. 823;

Murray v. *Charleston,* 96 U. S. 432, 24 L. Ed. 760;

Scott v. *Eaton,* 15 Wall. 380, 21 L. Ed. 72;

Murdock v. *Mayor of Memphis,* 20 Wall. 590, 22 L. Ed. 429, 441;

Satterlee v. *Matthewson,* 2 Peters 380, 7 L. Ed. 458, 468;

Crowell v. *Randell,* 10 Peters 368, 9 L. Ed. 458;

Craig v. *Missouri,* 4 Peters 410, 7 L. Ed. 903;

Wilson v. *Black Bird Creek Marsh Co.,* 2 Peters 245, 7 L. Ed. 412.

For reversal of the judgment of the Supreme Court of Arkansas, appellant relies upon the following cases:

Gulf C. & S. F. R. Co. v. *Ellis,* 165 U. S. 150, 41 L. Ed. 666;

Cotting v. *Kansas City Stock Yards Co.,* 183 U. S. 79, 46 L. Ed. 92;

Kentucky Finance Corporation v. *Paramount Auto Exchange Corporation,* 262 U. S. 544, 67 L. Ed. 1112;

Power Mfg. Co. v. *Saunders,* 274 U. S. 490, 71 L. Ed. 1165;

Quaker City Cab Co. v. *Pennsylvania,* 277 U. S. 389, 72 L. Ed. 927;

Frost v. *Corporation Commission of Oklahoma,* 278 U. S. 516, 73 L. Ed. 483;

Ballard v. *Mississippi Cotton Oil Co.,* 81 Miss. 507, 34 So. 533, 62 L. R. A. 407, 95 A. S. R. 476;

Bedford Quarries Co. v. *Bough,* 168 Ind. 671, 80 N. E. 529, 14 L. R. A. (N. S.) 418;
Chicago, M. & St. P. R. Co. v. *Westby,* 178 Fed. 619 (8 C. C. A.).

Dated the 21st day of June, 1935.

Respectfully submitted,

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